

IP 05-0408-M 1 F USA v Warner
Magistrate Kennard P. Foster

Signed on 12/02/05

NOT INTENDED FOR PUBLICATION IN PRINT

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 v.)
) CAUSE NO. IP 05-0408M-01
 ROBERT R. WARNER,)
)
 Defendant.)

Robert R. Warner is charged in a Criminal Complaint issued on October 21, 2005, with the unlawful possession of a firearm by a convicted felon in violation of 18 U.S.C. §922(g)(1). On November 22, 2005, at the initial appearance, the government made an oral motion for detention, which was followed by a written motion filed November 28, 2005, pursuant to 18 U.S.C. §§3142 (f)(1)(A), (f)(1)(D), and (f)(2)(A) and (B) on the grounds that this case involves a crime of violence, that the defendant had twice previously been convicted of violent crimes, there is a serious risk that Mr. Warner will flee if released, and a serious risk that Mr. Warner will obstruct justice or attempt to obstruct justice, or threaten, injure, or intimidate, or attempt to threaten, injure, or intimidate, a prospective witness. A preliminary examination and a detention hearing were held on November 28, 2005. The United States appeared by Assistant United States Attorney Timothy M. Morrison, and the defendant appeared in person and by his appointed counsel, Juval O. Scott.

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

1. The defendant, Robert R. Warner, is charged in this cause by criminal complaint with being a felon in receipt and possession of a qualifying firearm in violation of 18 U.S.C. 922(g)(1)

2. The maximum penalty under 18 U.S.C. §922(g)(1) is ten years' imprisonment. However, since the defendant has three prior convictions for qualifying crimes of violence on occasions different from one another, he is subject to the enhanced penalty provisions of 18 U.S.C. §924(e). Under that statute, Mr. Warner would face, upon conviction, a minimum period of imprisonment of 15 years, and a maximum term of life.¹

3. The Court takes judicial notice of the Complaint and the Affidavit In Support of the Complaint. The Court further incorporates the evidence admitted during the preliminary examination and detention hearing, as if set forth herein.

4. The government submitted the matter on preliminary examination on the Complaint, the Affidavit, and made affiant Sergeant Arkins available for cross-examination. Counsel for Mr. Warner cross-examined Sergeant Arkins. Mr. Warner presented no evidence on the issue of

¹ Pursuant to Title 18, United States Code, Section 924(e)(1), if a defendant has three previous convictions for qualifying violent felonies, or serious drug offenses, or both, committed on occasions different from one another, then upon conviction for an offense under Title 18, United States Code, Section 922(g), the minimum term of imprisonment is 15 years, and the maximum term is life. The sentence imposed is not subject to either suspension or probation. See, Title 18, United States Code, Section 924(e); *Taylor v. United States*, 495 U.S. 575 (1990); *United States v. Hudspeth*, 42 F.3d 1015 (7th Cir. 1994) (*en banc*), cert. den., 115 S.Ct. 2252, 132 L.ed.2d 260 (1995); *United States v. Howell*, 37 F.3d 1197 (7th Cir. 1994), cert. den., 115 S.Ct. 1810 (1995).

probable cause, but called Ms. Piano, a woman with whom Mr. Warner lives, on the issue of detention.

5. The Court admitted the Pretrial Services' report regarding the issue of release or detention. Furthermore, the Court admitted, without objection, Government's Exhibits 1 through 5, which were copies of Department of Corrections and court records relevant to the previous felony convictions suffered by Mr. Warner, as well as a transcript of a recorded statement he provided police after his arrest on the current charge.

6. The evidence regarding the commission of the charged offense is strong. On October 19, 2005, Indianapolis police officers, initiated a traffic stop of a blue Chevrolet Silverado truck driven by Robert R. Warner. Warner was a suspended driver and the truck had been reported stolen. When police searched the vehicle, they found a loaded, .45 caliber Hi Point pistol underneath the driver's seat. Warner was also found to be in possession of stolen credit cards and identification documents of another person. Warner provided police with a statement admitting he had received the truck from another individual, discovered the weapon under the seat, unloaded and reloaded with weapon, and had it for three days before his arrest.

Additionally, Mr. Warner has three prior convictions on occasions different from one another which are violent felonies, including armed robbery, burglary, and attempted burglary. (See Government Exhibits 1-3.) Also, recovery of a meth pipe from the truck prompted Mr. Warner to admit he was a methamphetamine abuser. (See Government Exhibit 5)

7. The Court finds there is probable cause to believe that Mr. Warner has committed the offenses charged in the Complaint; therefore, Mr. Warner is held to answer in the District Court.

8. Mr. Warner qualifies for a detention hearing upon the government's motion that he is charged with a crime of violence. 18 U.S.C. §3142(f)(1)(A).

9. Mr. Warner qualifies for a detention hearing upon the government's motion that he has suffered two or more qualifying convictions for qualifying crimes of violence, pursuant to 18 U.S.C. §3142(f)(1)(D).

10. Mr. Warner qualifies for a detention hearing upon the government's motion that he is a serious risk of flight. 18 U.S.C. §3142(f)(2)(A).

11. The evidence relevant to the factors set forth in 18 U.S.C. §3142(g) requires that Mr. Warner be detained as there is no condition or combination of conditions that will reasonably assure that he will appear as required for further proceedings, and will not engage in dangerous criminal activity pending trial, or obstruct, or attempt to obstruct justice, or threaten, injure, or intimidate, a prospective witness or a juror. Therefore, Mr. Warner is ORDERED DETAINED.

12. When evaluating the government's motion for pretrial detention, the Court engages a two-step analysis: first, the Court determines whether one of six conditions exists for considering a defendant for pretrial detention; second, after a hearing, the Court determines whether the standard for pretrial detention is met. *See United States v. Friedman*, 837 F.2d 48, 49 (2d Cir. 1988).

A defendant may be considered for pretrial detention in only six circumstances: when a case involves one of either four types of offenses or two types of risks. A defendant is eligible for detention upon motion by the United States in cases involving: (1) a crime of violence; (2) an offense with a maximum punishment of life imprisonment or death; (3) specified drug offenses carrying a maximum term of imprisonment of ten years or more; or (4) any felony

where the defendant has two or more federal convictions for the above offenses or state convictions for identical offenses. *See* 18 U.S.C. § 3142(f)(1). A defendant is eligible for detention upon motion by the United States or the Court *sua sponte* in cases involving: (5) a serious risk that the person will flee; or (6) a serious risk that the defendant will obstruct or attempt to obstruct justice, or threaten, injure, or intimidate, a prospective witness or juror. *See* § 3142(f)(2); *United States v. Sloan*, 820 F. Supp. 1133, 1135-36 (S.D. Ind. 1993). The existence of any of these six conditions triggers the detention hearing which is a prerequisite for an order of pretrial detention. *See* 18 U.S.C. §3142(e). The judicial officer determines the existence of these conditions by a preponderance of the evidence. *Friedman*, 837 F.2d at 49. *See also United States v. DeBeir*, 16 F. Supp.2d 592, 595 (D. Md. 1998) (serious risk of flight); *United States v. Carter*, 996 F. Supp. 260, 265 (W.D. N.Y. 1998) (same). In this case, the United States moved for detention pursuant to 18 U.S.C. §§3142(f)(1)(A), (f)(1)(D), (f)(2)(A), and (f)(2)(B). The Court has found that the government satisfied its burden of establishing that all of these bases exist.

Once it is determined that a defendant qualifies under any of the six conditions set forth in Section 3142(f), the court may order a defendant detained before trial if the judicial officer finds that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community. *See* 18 U.S.C. § 3142(e). Detention may be based on a showing of either dangerousness or risk of flight; proof of both is not required. *See United States v. Fortna*, 769 F.2d 243, 249 (5th Cir. 1985). With respect to reasonably assuring the appearance of the defendant, the United States bears the burden of proof by a preponderance of the evidence. *See United States v. Portes*, 786 F.2d 758, 765 (7th Cir. 1985); *United States v. Himler*, 797 F.2d 156, 161 (3d Cir. 1986); *United States v. Vortis*, 785 F.2d 327, 328-29 (D.C. Cir.), *cert. denied*, 479 U.S. 841, 107 S. Ct. 148, 93 L.Ed.2d 89 (1986); *Fortna*, 769 F.2d at 250; *United States v. Chimurenga*, 760 F.2d 400, 405-

06 (2d Cir. 1985); *United States v. Orta*, 760 F.2d 887, 891 & n. 20 (8th Cir. 1985); *United States v. Leibowitz*, 652 F. Supp. 591, 596 (N.D. Ind. 1987).

With respect to reasonably assuring the safety of any other person and the community, the United States bears the burden of proving its allegations by clear and convincing evidence. 18 U.S.C. § 3142(f); *United States v. Salerno*, 481 U.S. 739, 742, 107 S. Ct. 2095, 2099, 95 L.Ed.2d 697 (1987); *Portes*, 786 F.2d at 764; *Orta*, 760 F.2d at 891 & n. 18; *Leibowitz*, 652 F. Supp. at 596; *United States v. Knight*, 636 F.Supp. 1462, 1465 (S.D. Fla. 1986). Clear and convincing evidence is something more than a preponderance of the evidence but less than proof beyond a reasonable doubt. *Addington v. Texas*, 441 U.S. 418, 431-33, 99 S. Ct. 1804, 1812-13, 60 L.Ed.2d 323 (1979). The standard for pretrial detention is “reasonable assurance”; a court may not order pretrial detention because there is no condition or combination of conditions which would *guarantee* the defendant’s appearance or the safety of the community. *Portes*, 786 F.2d at 764 n. 7; *Fortna*, 769 F.2d at 250; *Orta*, 760 F.2d at 891-92.

13. The Court finds that possession of a .45 caliber semi-automatic handgun by a person who has previously been convicted of serious crimes of violence in the factual setting of this case, driving a stolen vehicle, is a crime of violence pursuant to 18 U.S.C. §3142(f)(1)(A). The Court also finds that Mr. Warner has three prior convictions for violent, qualifying felonies, as described in 18 U.S.C. §3142(f)(1)(D). The Court further finds there is clear and convincing evidence (even though the Court need find only by a preponderance of the evidence) that the defendant is a serious risk of flight if released. That evidence, coupled with the defendant’s propensity for violence and possession of firearms, by clear and convincing evidence also makes him a danger to the community.

14. The evidence presented in this case demonstrates there is no condition or combination of conditions of release that would reasonably assure the defendant's appearance in Court as ordered or the safety of the community.

WHEREFORE, Robert R. Warner is hereby committed to the custody of the Attorney General or his designated representative for confinement in a corrections facility separate, to the extent practicable, from persons awaiting or serving sentences or being held in custody pending appeal. Mr. Warner shall be afforded a reasonable opportunity for private consultation with defense counsel. Upon order of this Court or on request of an attorney for the government, the person in charge of the corrections facility shall deliver Mr. Warner to the United States Marshal for the purpose of an appearance in connection with the Court proceeding.

DATED this 2nd day of December, 2005.

KENNARD P. FOSTER
Magistrate Judge
United States District Court

cc: Timothy M. Morrison, Assistant United States Attorney, 10 West Market Street, Suite 2100, Indianapolis, IN 46204

Juval O. Scott, attorney for defendant, Federal Community Defenders.
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U. S. Marshal

U. S. Probation Office, Pre-Trial Services Division